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January 10, 2018

BY HAND

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
Permanent Select Committee on Intelligence
U.S. House of Representatives
Capitol Visitor Center HVC-304
U.S. Capitol Building
Washington, DC 20515

Re: December 27, 2017 Subpoena Issued to David Kramer

Dear Chairman Nunes and Ranking Member Schiff:

We represent David Kramer, who on December 27, 2017, was served with a subpoena signed by Chairman Nunes. For the reasons set forth below, the subpoena should be withdrawn and Mr. Kramer excused from providing the very limited additional information sought by the Committee. As you know, Mr. Kramer has already provided the Committee, on a voluntary basis, with substantial information. The Committee's effort to compel him to answer the one remaining question that he previously declined to answer places him and other persons in potential danger and threatens certain rights and privileges rooted in the U.S. Constitution.

Mr. Kramer Voluntarily Appeared Before This Committee On December 19, 2017

On December 19, 2017, Mr. Kramer appeared voluntarily at a closed session of this Committee. For nearly three hours, he answered questions fully and forthrightly, all in an effort to assist this Committee with its investigation. The questions largely related to (a) the circumstances surrounding a trip he made on November 28, 2016, at the express request of Senate Armed Services Committee Chairman John McCain, to London, England to meet with Christopher Steele, a former British intelligence officer, in order to learn about certain information Mr. Steele had reportedly collected from intelligence sources concerning allegations of collusion between the Trump campaign and Russia and Russian "kompromat" collected on Mr. Trump; (b) the circumstances surrounding Mr. Kramer's receipt of the so-called "dossier" (consisting of 33 pages of research memos) from Glenn Simpson in Washington, D.C. on November 29, 2016 (which Mr. Simpson later supplemented with an additional two-page memo); and (c) Mr. Kramer's provision of a copy of the "dossier" on November 30, 2016, to

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 2

Chairman McCain, who in turn gave it to the FBI. Mr. Kramer also answered various questions concerning his subsequent interactions in connection with the dossier with Mr. Steele, Mr. Simpson, Chairman McCain's staff, members of the press and others. Shortly after the hearing, Mr. Kramer provided the Committee with a copy of the entire 35-page dossier he received from Mr. Simpson. In short, Mr. Kramer answered virtually every question put to him, even when doing so risked embroiling him in the proliferating civil litigation relating to the dissemination of the dossier.

**Mr. Kramer Declined To Answer Only One Question – Because Answering It
Could Endanger His Life And The Lives Of Others**

The only question that Mr. Kramer declined to answer involved a request to reveal Mr. Steele's purported sources. As Mr. Kramer explained to the Committee, his principal reason for declining to provide that information was a concern over whether that information – whose accuracy he was unsure of – would remain confidential, given the leaks that had emanated from this Committee and the very real risk of serious harm (including assassination) that might befall those individuals if their identities were revealed to the public. That concern, Mr. Kramer explained to the Committee, was founded not only on his many years of close study of the actions of Russian intelligence operatives and agencies (including in his capacities as a former President of Freedom House and Assistant Secretary of State for Human Rights). It was also based on the fact that at least one individual who was thought to be associated with the dossier, Oleg Erovinkin, was found murdered in his car (and, as detailed below, there have been many other prominent instances in recent years of suspected assassinations and poisonings by Russian intelligence operatives). This same concern, Mr. Kramer explained to the Committee, caused him to urge BuzzFeed, after it posted the dossier, to take the dossier down immediately because otherwise people were going to be killed. And it was the reason that, after the dossier was posted online by BuzzFeed and Mr. Steele's identity was revealed by the Wall Street Journal, Mr. Steele became fearful for his own safety and immediately went into hiding. As Mr. Kramer explained, this same nefarious and brutal track record of Russian intelligence has caused him to fear that his appearance before the Committee might imperil his own safety if his knowledge of these sources were to be disclosed to the public. During the December 19 session, Ranking Member Schiff, recognizing that leaking was a serious concern, suggested that additional steps might be taken to ensure the confidentiality of Mr. Kramer's information.

Even though Mr. Kramer was not willing to disclose the names, he did, as the Committee may recall, try to be helpful in providing some additional information concerning the sources. But Mr. Kramer remained steadfast in his refusal to provide the individuals' names themselves, out of his deep concern for both his own safety and the safety of those listed.

In our subsequent dealings with the Committee, the staff has expressly confirmed that the sole purpose for issuing the present subpoena is to compel Mr. Kramer to provide Mr. Steele's purported sources. Indeed, Committee staff repeatedly offered to withdraw the subpoena if Mr. Kramer would agree to supply, in writing, the names furnished by Mr. Steele. See Exhibit A (L. Robbins letter dated Dec. 29, 2017).

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 3

**Prolific Committee Leaks About Mr. Kramer's Testimony Before This Committee
Prove That His Concerns Are More Than Justified**

As explained more fully below, and reflected in the attached copies of correspondence with this Committee, events that have occurred since Mr. Kramer's December 19 appearance – including multiple leaks of confidential information from the Committee – have only confirmed his legitimate fear that the Committee cannot ensure the confidentiality of any future testimony by Mr. Kramer. See Exhibit B (L. Robbins letter dated Dec. 23, 2017) (describing leaks); Exhibit C (L. Robbins letter dated Jan. 5, 2018) (describing yet more leaks).

More specifically, less than two hours after Mr. Kramer left the Capitol Visitor's Center on December 19, the fact of his appearance was reported in the press. See, e.g., Katie Bo Williams, *House Intel Panel Interviews Key Figure in Trump Dossier Saga*, The Hill (Dec. 19, 2017, 1:47 p.m.), <http://thehill.com/policy/national-security/365631-house-intel-panel-interviews-key-figure-in-trump-dossier-saga>. Then, several days later, on Friday, December 22, I received a very disturbing phone call from the private counsel for another witness before the Committee, who contacted me to ask for Mr. Kramer's assistance. That counsel reported that he had received a call from a Committee source, who in turn apprised this attorney of specific details purportedly from Mr. Kramer's testimony. He further stated that the Committee source had urged him to contact me so as to confirm the facts as to which Mr. Kramer had purportedly testified. I, of course, declined to do so.

Faced with such a clear violation of Committee Rule 12 – as well as the promises of strict confidentiality made to Mr. Kramer by Committee staff and Members – I immediately wrote to bring this breach to the Committee's attention. See Exhibit B (L. Robbins letter dated Dec. 23, 2017). Rather than receiving any response echoing or even acknowledging our serious concerns, we received the instant subpoena on December 27 at 2:49 p.m. And then, *just 10 minutes after that* – at 2:59 p.m. – Byron York of the Washington Examiner posted a story reporting that the subpoena had been issued, and purporting to provide yet additional details from Mr. Kramer's testimony, gleaned once again from a Committee source. See Bryon York, *McCain Associate Subpoenaed in Trump Dossier Probe*, The Washington Examiner (Dec. 27, 2017, 2:59 p.m.), <http://www.washingtonexaminer.com/byron-york-mccain-associate-subpoenaed-in-trump-dossier-probe/article/2644460>. The leaks have since been further disseminated by additional media outlets. See, e.g., *Investigators Want Info on Sources Behind Anti-Trump Dossier*, Fox News (Dec. 28, 2017, 4:49 p.m.), <http://video.foxnews.com/v/5695186672001/?#sp=show-clips>; Kristina Wong, *House Intel Committee Subpoenas McCain Associate David Kramer for Trump Dossier Answers*, Breitbart News Network (Dec. 27, 2017), <http://www.breitbart.com/big-government/2017/12/27/house-intel-committee-subpoenas-mccain-associate-david-kramer-for-trump-dossier-answers/>; Chuck Ross, *House Panel Subpoenas McCain Associate for Names of Steele's Dossier Sources*, The Daily Caller (Dec. 27, 2017, 3:49 p.m.), <http://dailycaller.com/2017/12/27/house-panel-subpoenas-mccain-associate-for-names-of-steeles-dossier-sources/>.

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 4

**The Committee Should Withdraw The Subpoena And Excuse Mr. Kramer
From Answering Any Further Questions**

For at least three independent reasons, discussed in greater detail below, the Committee should withdraw the subpoena and excuse Mr. Kramer from answering any further questions. *First*, the Committee should not seek to compel Mr. Kramer (or any witness) to do something that would likely place him (and other people) at serious risk of harm. *Second*, the demand made pursuant to the Committee's subpoena that Mr. Kramer provide compelled testimony about actions taken on behalf of Chairman McCain violates the Speech or Debate Clause of the U.S. Constitution. And *third*, the Committee's demand pursuant to subpoena (unlike Mr. Kramer's prior voluntary testimony, which was not given in response to any form of governmental compulsion) entitles him, under the admittedly highly unusual circumstances in which he finds himself today (which are detailed below), to invoke his privilege under the Fifth Amendment against self-incrimination – even while making clear, emphatically, that he is completely innocent of any criminal wrongdoing.

**The Committee Should Not Seek To Force Mr. Kramer To Take An Action
That Would Place Himself – And The Individuals Whose Names The
Committee Is Seeking – At Risk Of Serious Harm**

This Committee should not deploy its subpoena powers to compel an individual to do something that is likely to inflict serious harm on himself or on third parties. This principle is so firmly rooted in common sense and ordinary decency that it should require no citation to authority. But its acceptance is clearly reflected in a variety of legal and equitable doctrines. To give but one example, both English and American courts for centuries have recognized the necessity defense (otherwise known as the “choice-of-evils” doctrine) as an affirmative defense to criminal prosecution. The necessity defense generally requires a comparison between (1) the harm prevented by the law that the defendant violates and (2) the harm that would occur if the defendant complied with that law. See American Law Institute, Model Penal Code § 3.02(1) (1962) (“Conduct which the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . .”). This doctrine is also based on the recognition that “[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.” *Baender v. Barnett*, 255 U.S. 224, 226 (1921) (giving example of prisoner who escapes because the jail is on fire).

This Committee's subpoena powers are not unlimited, and they should not be deployed where, as here, they would create a serious risk of harm to a witness and to third parties. These risks of potential harms, moreover, plainly are not outweighed by the slight benefits, if any, that the Committee would obtain from insisting that Mr. Kramer answer this one remaining question. Accordingly, the Committee should withdraw the subpoena.

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 5

a. Serious Risks Of Harm Could Arise If The Alleged Dossier Sources Were Revealed

As Mr. Kramer previously explained to the Committee, his mere appearance before this Committee on December 19 to testify about his involvement with the dossier (and his knowledge of its purported intelligence sources) raised legitimate concerns on his part for the potential for unwanted attention (or worse) directed at him by Russian intelligence operatives. The media attention that Mr. Kramer has received thanks to multiple leaks from this Committee (described in greater detail above) has made him even more nervous about his own safety and that of his family. The area where Mr. Kramer now lives and works is home to many Russian emigres and other Russians who have purchased property and who vacation there. Many of these individuals are supportive of both Putin and President Trump, and reckless leaks concerning Mr. Kramer's testimony could make him a target for any of them who might be so inclined in such a highly politicized environment. This is not paranoia, nor is it unfounded. Mr. Kramer already has been the target of several known hacking attempts – one in the fall of 2016 and two more in the summer of 2017. Further leaks are likely only to paint an even bigger bulls-eye on Mr. Kramer and invite further hacking and possible physical harm.

What is more, as Mr. Kramer previously explained, his provision to this Committee of the names of the sources of the dossier would raise a serious risk of harm to *third parties* – specifically, to those purported sources. Although Mr. Kramer discussed this issue at length with Committee Members and staff at the December 19 session, it may be that the gravity of the threat was not fully grasped by those present (or by Chairman Nunes, who was not present but who signed the subpoena). Accordingly, we have identified below a list of individuals who likely have suffered serious harm in recent years reportedly at the hands of the Russian intelligence services:

- Even before the so-called dossier was released, in December 2016, Oleg Erovinkin, a senior associate of Igor Sechin, the head of Rosneft (the state-owned oil company), was found dead in the back of his car under mysterious circumstances; press reports speculated that he may have been a source for the dossier and thus killed for his suspected role. (Robert Mendick & Robert Verkaik, *Mystery Death of Ex-KGB Chief Linked to MI6 Spy's Dossier on Donald Trump*, The Telegraph (Jan. 27, 2017, 9:30 p.m.), <http://www.telegraph.co.uk/news/2017/01/27/mystery-death-ex-kgb-chief-linked-mi6-spys-dossier-donald-trump/>; Andrew E. Kramer, *Hacker Is a Villain to Russia and the United States for Different Reasons*, New York Times (March 16, 2017), <https://www.nytimes.com/2017/03/16/world/europe/russian-hacker-fsb-agent-dmitry-dokuchaev.html>);
- Even members of Russia's intelligence service have been swept up in the situation relating to the dossier. Sergei Mikhailov was arrested in December 2016 and Dmitry Dokuchaev in January 2017 for treason and illegal hacking, though some media reports suspect they played some role in regard to the dossier. (Andrew E. Kramer, *Top Russian Cybercrimes Agent Arrested on Charges of Treason*, New York Times (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/world/europe/sergei-mikhailov-russian-cybercrimes-agent-arrested.html>);

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 6

- Mikhail Lesin, former Russian minister for communications, died mysteriously in his Washington, D.C. hotel in November 2015 from blunt force injuries to his head and torso. Some reports suggested Lesin was cooperating with the FBI in a criminal investigation of his former Russian business colleagues and officials, and that such a role may have been a factor in his death. (Jason Leopold et al., *"Everyone Thinks He Was Whacked,"* BuzzFeed (July 28, 2017, 12:59 p.m.),
- Grigory Rodchenkov, the whistleblowing chemist who exposed Russia's systemic doping of Olympic athletes, has been warned by U.S. officials that Russian agents may already be in America seeking to harm the former director of the Moscow Anti-Doping Center. Rodchenkov has previously admitted that he masterminded the state-sponsored cheating plot targeting the 2014 Olympic Games in Vladimir Putin's home turf of Sochi – the exposure of which led the International Olympic Committee to ban the entire Russian team from February's Games in Pyeongchang, South Korea. Rodchenkov's lawyer has stated that Rodchenkov is in hiding and receiving help from the federal Witness Protection Program in the United States. "It's an incredibly tense situation," Rodchenkov's lawyer has stated, "If they get the opportunity, they will take him out." (Michael Isikoff, *Putin Seethes Over Olympic Ban, Doping Whistleblower Fears for His Life*, Yahoo News (Dec. 26, 2017),
- Alexander Litvinenko, a former agent of the Russian FSB (the successor agency to the KGB), received asylum in London after becoming an outspoken critic of President Putin. In 2006, he was poisoned to death by polonium in a London hotel by two suspected Russian agents; according to an official British inquiry, Putin "probably approved" the poisoning of Litvinenko. (Alan Cowell, *Putin 'Probably Approved' Litvinenko Poisoning, British Inquiry Says*, New York Times (Jan. 21, 2016),
- Alexander Perepilichny, a Russian businessman turned whistleblower of the Putin regime, died under mysterious conditions near London in 2012. Subsequent lab results showed he died from ingesting a rare poison. (Jeffrey E. Stern, *An Enemy of the Kremlin Dies in London*, The Atlantic (Jan./Feb. 2017),
- Vladimir Kara-Murza, a prominent opposition activist, was poisoned twice in Russia, the first time in April 2015 and the second time in February 2017. He miraculously survived both attempts on his life. (Andrew E. Kramer, *Putin Critic, Who Said He Was Poisoned in 2015, Falls Into Coma*, New York Times (Feb. 6, 2017),

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 7

<https://www.nytimes.com/2017/02/06/world/europe/russia-vladimir-kara-murza-putin.html>);

- Anna Politkovskaya, a Russian journalist who exposed abuses in Chechnya, was shot and killed in her apartment building in 2006. (*Anna Politkovskaya*, The Economist (Oct. 12, 2006), <http://www.economist.com/node/8023316>); and
- Ramzan Kadyrov, leader of the Chechen Republic in Russia and a strong supporter of Putin, is suspected of ordering a number of murders of critics of him and Putin, both in Russia and beyond the country's borders. He is suspected of seeking to demonstrate his fealty to Putin by ordering the murders of various figures, including Boris Nemtsov, shot and killed yards from the Kremlin in February 2015. Those who ordered Nemtsov's murder have yet to be found. (David Satter, *Who Killed Boris Nemtsov?*, National Review (Oct. 31, 2017, 4:00 a.m.), <http://www.nationalreview.com/article/453266/boris-nemtsov-assassination-russia-evidence-vladimir-putin-regime-guilty-chechen-leader-ramzan-kadyrov>; Shaun Walker, *Boris Nemtsov Murder: Chechen Chief Kadyrov Confirms Link to Prime Suspect*, The Guardian (March 8, 2015, 4:18 p.m.), <https://www.theguardian.com/world/2015/mar/08/boris-nemtsov-five-suspects-appear-in-court-over-opposition-leaders-killing>).

There are many other examples we could cite, and countless more examples no doubt exist that have never been publicly reported. And, as the examples of Sergei Mikhailov and Dmitry Dokuchaev suggest, the risk of harm is not limited to poisoning and other forms of assassination. There is also the risk of arrest, imprisonment, bodily injury that does not result in death, and other negative consequences Russian intelligence operatives elect to inflict during interrogation sessions or otherwise.

The likelihood of such potentially catastrophic harms befalling those whose names would be revealed by Mr. Kramer depends, of course, on the possibility that the confidentiality of those names will not be safeguarded by the Committee. As explained above and in separate letters to this Committee, which are attached and incorporated by reference herein, the risk of such disclosure is demonstrably high. See Exhibit B (L. Robbins letter dated Dec. 23, 2017); Exhibit C (L. Robbins letter dated Jan. 5, 2018); see also pages 3-4, *supra*. Despite repeated assurances from this Committee that Mr. Kramer's appearance and testimony on December 19 would remain confidential, and notwithstanding Committee and House rules requiring such confidentiality, there have been no fewer than *three separate leaks* of confidential information since the December 19 session. First, the fact of Mr. Kramer's appearance was leaked to the press within hours of his leaving the Capitol. Several days later, counsel received a phone call from counsel for another witness that reflected a second leak. And then literally within minutes of receiving the Committee's subpoena, the fact of that subpoena, as well as further purported details of Mr. Kramer's testimony, were disclosed to the world in a news article.

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 8

We have asked this Committee to investigate these clear violations of the Committee's and the House's rules and to discipline the wrongdoers. As far as we are aware, nothing has been done in response to these serious concerns.

In light of these facts, Mr. Kramer can only conclude that the Committee is unable or unwilling to guarantee the confidentiality of the limited additional information it is seeking pursuant to its subpoena. There is accordingly a very serious risk of harm to others, and to himself, if he answers the Committee's remaining question.

b. The Committee's Investigation Will Not Be Impaired If Mr. Kramer Does Not Answer This One Question

We recognize that the Committee has a legitimate interest in investigating the facts surrounding the dossier and the strength of the dossier's allegations of collusion between the Trump campaign and Russia. At the same time, however, Mr. Kramer's unwillingness for valid security reasons to answer a single narrow question – after spending hours voluntarily answering each and every other question posed by Committee members and staff – hardly imperils the Committee's mission or casts doubt on its ability to carry out its investigation.

To begin with, as previously explained, the Committee's acknowledged purpose in issuing this subpoena is to require Mr. Kramer to answer a single, narrow question concerning Mr. Steele's purported sources. That purpose is reflected in the Committee's offer to withdraw the subpoena if Mr. Kramer provides those names in a letter. The amount of information at stake is thus small.

In addition, as we pointed out during the December 19 session, there is no way of knowing whether those purported sources are in fact the *actual* sources of Mr. Steele's information. As Mr. Kramer explained, Mr. Steele reportedly was not in direct contact himself with any of these purported sources; there was an intermediary with whom Mr. Steele had worked in the past. Thus, Mr. Steele learned of the identities second-hand, and Mr. Kramer's knowledge is third-hand knowledge. The possibility that one or more of those names are people who are *not* the actual sources both increases the risk that grave harm could befall someone who is uninvolved with the dossier and underscores the slightness of any harm to the Committee or its investigation that might result from withholding this information.

Finally, recent developments raise a serious question whether this Committee would actually be deprived of *any* information if Mr. Kramer declined to answer the question concerning purported sources. On Wednesday, January 3, 2018, Chairman Nunes announced that the Committee had reached an agreement with the Justice Department under which the Committee had gained access to "all" the documents and witnesses it sought, including information concerning the dossier. See Daniel Chaitin, *Devin Nunes: House Intelligence Will Get "All" Documents, Witnesses It Sought from DOJ*, The Washington Examiner (Jan. 3, 2018, 10:25 p.m.), <http://www.washingtonexaminer.com/devin-nunes-house-intelligence-will-get-all-documents-witnesses-it-sought-from-doj/article/2644927>. It has been reported that FBI agents interviewed Mr. Steele last year over several days. Presumably they asked him about his sources

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 9

and he provided those to those agents. In light of Chairman Nunes's statement, it is not clear why the Committee continues to press Mr. Kramer to provide information which we assume is entirely duplicative of what the Justice Department has already agreed to provide.¹

The Subpoena Violates The Speech Or Debate Clause

The Committee's subpoena impermissibly seeks to compel testimony regarding Chairman McCain's *legislative* acts in a "Place" other than the Senate, in clear violation of the Speech or Debate Clause of the U.S. Constitution. See U.S. Const. Art. I, § 6, cl. 1 ("For any Speech or Debate in either House [Senators and Representatives] shall not be questioned in any other Place."); see also Annys Shin & Libby Casey, *Anita Hill and Her 1991 Congressional Defenders to Joe Biden: You Were Part of the Problem*, The Washington Post Magazine (Nov. 22, 2017), https://www.washingtonpost.com/lifestyle/magazine/anita-hill-and-her-1991-congressional-defenders-to-joe-biden-you-were-part-of-the-problem/2017/11/21/2303ba8a-ce69-11e7-a1a3-0d1e45a6de3d_story.html?utm_term=.bfe14eae2e63 (recounting how female members of the House were denied entry to Senate Chamber on ground they were "strangers").

Just as Chairman McCain could not be compelled to testify about his own investigative and information-gathering activities protected by the Clause, see *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (en banc) ("The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly."), neither can Mr. Kramer be called to testify about such activities when done, as was clearly the case here, at Chairman McCain's specific behest, see *Gravel v. United States*, 408 U.S. 606, 616 (1972) ("We agree with the Court of Appeals that for the purpose of construing the privilege a Member and his aide are to be treated as one . . .") (internal quotation marks omitted). We believe that the record establishes that Mr. Kramer was serving as a *de facto* aide to Chairman McCain when he traveled to London, met with Mr. Steele (and was shown the list of sources), returned to Washington D.C., and obtained and gave to the Chairman a copy of the dossier – all acts clearly undertaken at the Chairman's express request.

As you know, Senator McCain is the Chairman of the Senate Committee on Armed Services and an ex officio member of the Senate Select Committee on Intelligence. (He is also a Member of the Senate Committee on Homeland Security and Governmental Affairs.) Thus, Chairman McCain is clearly involved in committees with significant jurisdiction over matters of National Security. There can be no doubt that his investigation into the dossier and the allegations of collusion between the Trump campaign and Russia and Russian "kompromat" collected on Mr. Trump are legitimate subjects of his concern. In addition, although the compelled disclosure of any legislative activity would undercut congressional independence by chilling the candid exchanging of views and by discouraging vigorous congressional investigation and oversight, we note that confidentiality concerns are particularly acute where

¹ Needless to say, if the House were to refer this subpoena to the Department of Justice for enforcement, Mr. Kramer would be able to assert a necessity defense, as well as appeal to the trial court's equitable discretion based on the same arguments in text.

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 10

public disclosure of sources' identities is at stake. See *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-31 (9th Cir. 1983) ("Informants may, in confidence, give information that is useful in exposing corruption within the government or elsewhere. If a source's identity is disclosed, he could suffer serious adverse consequences. In the case of organized crime, for example, disclosure could even be life-threatening. The possibility of public exposure could constrain these sources. It could deter constituents from candid communication with their legislative representatives and otherwise cause the loss of valuable information.").

**Under The Highly Unusual Circumstances In Which He Finds Himself, Mr. Kramer
Is Entitled To Invoke The Fifth Amendment Privilege Against
Self-Incrimination In Declining To Answer The Remaining Question**

The Fifth Amendment to the U.S. Constitution protects an individual from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege applies in congressional investigations. See *Watkins v. United States*, 354 U.S. 178, 187-88 (1957) ("[T]he constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves."); *id.* at 195-96 (discussing history of "Fifth Amendment privilege against self-incrimination" being "frequently invoked and recognized as a legal limit upon the authority of a committee to require that a witness answer its questions").

Under the Fifth Amendment and applicable precedents, no person may be compelled to provide testimony when he has "reasonable cause to apprehend danger from a direct answer," *Hoffman v. United States*, 341 U.S. 479, 486 (1951), even when that person is entirely innocent. Indeed, the Supreme Court has "emphasized that one of the Fifth Amendment's basic functions . . . is to protect innocent men . . . who otherwise might be ensnared by ambiguous circumstances." *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (internal quotation marks omitted). Moreover, the Court has made clear that "[t]his provision . . . must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman*, 341 U.S. at 486. And "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 486-87.

Although Mr. Kramer's actions in connection with the dossier were undertaken at the express request of Chairman McCain – and were done for reasons of patriotism and civic concern that are (or should be) totally beyond reproach (much less the basis for any criminal liability) – recent events, including many occurring since Mr. Kramer's voluntary appearance on December 19, have given rise to a reasonable fear on his part that he will face "danger from a direct answer" to questions about the identity of the dossier's sources or other questions about the dossier. More specifically, on several occasions since December 19, President Trump has stated publicly (and with increasing vehemence) his view that (a) the dossier is "bogus" and (b) the allegations of collusion between his campaign and Russia currently under investigation by the Justice Department (including those contained in the dossier) are a "total hoax." On

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 11

Tuesday, December 26, for example, the President tweeted that the dossier was “bogus.” See Katelyn Polantz, *Trump's Tweets Central to Legal Cases on Dossier, Travel Ban, and More*, CNN (Dec. 28, 2017, 3:47 p.m.), <http://www.cnn.com/2017/12/28/politics/trump-tweets-legal-cases-official-statements/index.html>. On Friday and again on Saturday, January 5 and 6, 2018, the President declared on Twitter that the allegation of collusion was a “total hoax.” Brooke Singman, *Trump Slams 'Phony' Book as Distraction from Russian Collusion 'Hoax,'* Fox News (Jan. 5, 2018), <http://www.foxnews.com/politics/2018/01/05/trump-slams-phony-book-as-distraction-from-russia-collusion-hoax.html>; Dave Boyer, *Trump, Responding to Allegations in Book, Says He's a 'Stable Genius,'* The Washington Times (Jan. 6, 2018), <https://www.washingtontimes.com/news/2018/jan/6/trump-responding-allegations-book-says-hes-stable-/>.

Nor is this all. On Friday, January 5, 2018, Senate Judiciary Committee Chairman Grassley and Senator Graham reportedly sent a letter recommending that the Justice Department open a criminal investigation of Christopher Steele in connection with his work on the dossier and dealings with the FBI. See Devlin Barrett & Tom Hamburger, *Senior Republican Refers Trump-Russia Dossier Author for Possible Charges*, The Washington Post (Jan. 5, 2018), https://www.washingtonpost.com/politics/senior-republican-refers-trump-dossier-author-for-possible-charges/2018/01/05/ead4585e-f0af-11e7-b390-a36dc3fa2842_story.html?utm_term=.3044682dcd85.

Other charges could well be added should the Justice Department take up the Senators' referral. As the Committee is no doubt aware, many provisions of federal criminal law are cast in broad terms (or have been broadly construed by the courts notwithstanding the rule of lenity). To give but one example, under a longstanding interpretation of the conspiracy statute, 18 U.S.C. § 371, the crime of conspiracy to defraud the United States includes efforts “to interfere with or obstruct” one of the federal government’s “lawful governmental functions by deceit, craft or trickery,” whether or not the government suffers any pecuniary loss or property loss as a consequence. See, e.g., *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (“To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.”); *United States v. Davis*, 863 F.3d 894, 901 (D.C. Cir. 2017) (“To prove Andre’s guilt beyond a reasonable doubt on Count 1, conspiracy, the government had to prove that he knowingly agreed with Sherri (or another person) to defraud the federal government of money or to *deceptively interfere with the lawful functions of the IRS.*”) (emphasis added); *In re Sealed Case*, 676 F.2d 793, 815 n.92 (D.C. Cir. 1982) (“Conspiracies in violation of [Section] 371 need not cause any monetary loss to the government, so long as they interfere with or obstruct its lawful functions.”); *United States v. Harding*, 81 F.2d 563, 567 (D.C. Cir. 1936) (“[T]he conspiracy statute . . . is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government.”). Given the emphatically held view of the Nation’s chief law enforcement officer – President Trump – that the dossier is little more than a fraudulent

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 10, 2018
Page 12

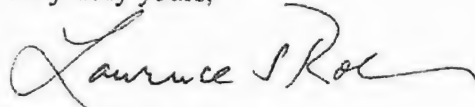
and illegitimate effort to derail his Administration, anyone who had a hand in disseminating the dossier now has a well-founded fear of prosecution, however meritless such a prosecution would be.

Finally, recent media reports have credibly suggested not only that President Trump regards the Justice Department as subject to his direction – and has acted on that flawed understanding with respect to the Russia investigation – but also that the President’s tweets can have a real impact on the Justice Department’s activities. See, e.g., Michael S. Schmidt, *Obstruction Inquiry Shows Trump’s Struggle To Keep Grip on Russian Investigation*, New York Times (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/trump-sessions-russia-mcgnah.html> (reporting that President Trump dispatched White House Counsel to persuade Attorney General Sessions not to recuse himself from Russia investigation and angrily asked, “Where’s my Roy Cohn?” when that effort was not successful); Philip Bump, *We’re Seeing Institutions Start To Waver as Constraints to Trump’s Impulses*, The Washington Post. (Jan. 5, 2018), https://www.washingtonpost.com/news/politics/wp/2018/01/05/were-seeing-institutions-start-to-waver-as-constraints-to-trumps-impulses/?hpid=hp_rhp-top-table-main_bump-240am:homepage/story&utm_term=.c0507440008e (suggesting that other recent comments by President Trump relating to former AGs Robert Kennedy and Eric Holder show that he “clearly sees the job of attorney general as, in part, protecting the president from scrutiny and criminal investigation”); Matt Zapotosky & Devlin Barrett, *FBI Has Been Investigating the Clinton Foundation for Months*, The Washington Post (Jan. 5, 2018), https://www.washingtonpost.com/world/national-security/the-fbi-is-investigating-the-clinton-foundation/2018/01/05/1aca0d4a-f1cf-11e7-97bf-bba379b809ab_story.html?tid=a_inl&utm_term=.9b7105c4c763 (revealing that FBI has revived an investigation that previously had been closed into another frequent subject of the President’s tweets).

In light of all of these circumstances, it is hardly fanciful to imagine a scenario in which Mr. Kramer could be put in jeopardy even though he is, as we have explained, *wholly innocent of any criminal wrongdoing* (and indeed his conduct at the behest of Chairman McCain is deserving only of praise). Under these admittedly rather unusual circumstances, Mr. Kramer has no choice but to invoke his Fifth Amendment privilege.

For all of the foregoing reasons and those set forth in the attached letters, we ask the Committee to withdraw the subpoena and excuse Mr. Kramer from answering any further questions.

Very truly yours,



Lawrence S. Robbins

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December 29, 2017

VIA EMAIL & FIRST CLASS MAIL

Kashyap P. Patel
Senior Counsel for Counterterrorism
U.S. House of Representatives
Permanent Select Committee on Intelligence
Capitol Visitor Center HVC-304
U.S. Capitol Building
Washington, DC 20515

Dear Mr. Patel:

I write to follow-up on our phone conversation this morning regarding the subpoena issued by Chairman Devin Nunes to my client, David Kramer, seeking his deposition on January 11, 2018. While I appreciate your offer, on behalf of the Committee, to withdraw the subpoena seeking Mr. Kramer's testimony if he agrees to provide by letter the names of certain possible sources for the Steele dossier, Mr. Kramer is not prepared to proceed on that basis. We will instead respond to the subpoena at a deposition on a mutually agreeable date.

As I explained to you this morning, we will need a short adjournment of the deposition from the current January 11 return date. I am receiving oncological treatment that day, and will thereafter be in Guam for a long-scheduled teaching obligation for lawyers and judges of the Northern Pacific Islands from January 13 to January 20. Because you have informed me that Committee Members will be out of town the week of January 22, I have asked that you provide possible dates from and after the week of January 29.

Thank you for cooperation in this matter. I look forward to hearing from you.

Very truly yours,

Lawrence S. Robbins /dsr
Lawrence S. Robbins

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December 23, 2017

VIA EMAIL & FIRST CLASS MAIL

Representative K. Michael Conaway
Representative Adam Schiff, Ranking Member
U.S. House of Representatives
Permanent Select Committee on Intelligence
Capitol Visitor Center HVC-304
U.S. Capitol Building
Washington, DC 20515

Dear Representative Conaway and Ranking Member Schiff:

I represent David Kramer, who as you know appeared voluntarily this past Tuesday at a closed-door session of the House Permanent Select Committee on Intelligence to answer questions regarding, among other areas, his interactions with Christopher Steele concerning the so-called dossier prepared by Mr. Steele. Both before and during the interview, various Members and staff, including both of you and Mr. Patel, assured Mr. Kramer and me that both the fact of Mr. Kramer's appearance, as well as the contents of his interview by the Committee, would be treated with the utmost confidentiality.

Early Friday afternoon, not three days after receiving these repeated assurances of confidentiality, I received an email from Stephen Ryan, counsel for Michael Cohen. That email, attached to this letter, informed me that he had been contacted by someone from the House, who in turn urged that Mr. Ryan call me to discuss matters arising from Mr. Kramer's interview.

That same day, I left a message with Mr. Ryan's assistant saying I was responding to his email request to speak to me. A few hours later, Mr. Ryan called me back. At the outset – and before he said anything of substance – I made clear to Mr. Ryan that, contrary to the suggestion in his email, our clients did *not* share a common interest, and therefore that anything he chose to tell me would fall outside the ambit of any privilege. He said he understood.

Mr. Ryan then proceeded to tell me that someone from the House (which I took to mean the House Intel Committee) had informed him that (a) Mr. Kramer had spoken with Mr. Steele; (b) Mr. Steele had told Mr. Kramer that certain facts regarding Mr. Cohen contained in the dossier were inaccurate; and (c) it would be helpful to Mr. Cohen's ongoing defense if I would

Representative K. Michael Conaway
Representative Adam Schiff, Ranking Member
December 23, 2017
Page 2

be willing to confirm, and perhaps expand on, the information already conveyed to Mr. Ryan concerning Mr. Kramer's discussions with Mr. Steele.

I advised Mr. Ryan that I could neither confirm nor deny anything he had been told by his source. I also told Mr. Ryan that I regarded it as disgraceful that someone from the Committee had chosen to reach out to him with purported information regarding Mr. Kramer's confidential testimony. Mr. Ryan asked me whether I would at least agree not to write a letter along these lines to the Committee; I reminded him that I had told him at the outset that our clients did not share a common interest, and that I would therefore act solely with Mr. Kramer's interests in mind.

It would be difficult to overstate the extent of my client's and my dismay and disappointment that the explicit and repeated assurances of confidentiality have turned out, almost overnight, to be so completely unreliable. As we stated at the interview, my client has sought, at some personal peril, to cooperate with the Committee; yet this clear breach of the explicit promises of confidentiality leaves us with no confidence – none – that information Mr. Kramer provided will be adequately safeguarded from public disclosure.

Very truly yours,

Lawrence S. Robbins / A.E.U.

Lawrence S. Robbins

cc: Nick Ciarlante
Kash Patel
Mark Stewart
Wells Bennett
Maher Bitar
Shannon Green

From: Ryan, Stephen <SRyan@mwe.com>
Sent: Friday, December 22, 2017 12:29 PM
To: Robbins, Larry
Subject: can you call me please--possible joint privilege issue.

My client: Michael Cohen
Your client-Mr. Kramer (sp?)
Dossier issue. A House person suggested I connect.
Thanks.

Stephen M. Ryan
Partner

McDermott Will & Emery LLP : The McDermott Building | 500 North Capitol Street, N.W. | Washington, DC 20001
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January 5, 2018

VIA EMAIL & FIRST CLASS MAIL

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
Permanent Select Committee on Intelligence
U.S. House of Representatives
Capitol Visitor Center HVC-304
U.S. Capitol Building
Washington, DC 20515

Dear Chairman Nunes and Ranking Member Schiff:

I represent David Kramer, who appeared voluntarily on Tuesday, December 19, 2017, at a closed session of the House Permanent Select Committee on Intelligence (the "Committee").

Prior to Mr. Kramer's appearance, as well as during the session itself, I asked for and received repeated assurances not only from Committee staff but also from Members that Mr. Kramer's testimony would be considered confidential under House and Committee rules, and that the Committee would safeguard and protect from public disclosure both the fact of Mr. Kramer's appearance and, of course, the content of his testimony. As we discussed, this confidentiality commitment was critically important to Mr. Kramer because public disclosure of these matters could place him (and others) at risk of serious harm. In the absence of these assurances, Mr. Kramer would not have agreed to appear voluntarily before your Committee, much less testify so fully, including as to matters that have already placed him in harm's way.

Less than two hours after Mr. Kramer left the Capitol Visitor's Center, the fact of his appearance was reported in the press. See Katie Bo Williams, *House Intel Panel Interviews Key Figure in Trump Dossier Saga*, The Hill (Dec. 19, 2017, 1:47 p.m.), <http://thehill.com/policy/national-security/365631-house-intel-panel-interviews-key-figure-in-trump-dossier-saga>. Moreover, as I recounted in my December 23, 2017, letter (which was addressed to Representatives Conaway and Schiff because they were the senior Members who attended the December 19 session), on Friday, December 22, I received a very disturbing phone call: Private counsel for another witness before the Committee contacted me to ask for Mr. Kramer's assistance. Counsel reported that he had received a call from a Committee source, and he then purported to recount specific details from Mr. Kramer's testimony.

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 5, 2018
Page 2

Faced with such a clear violation of Committee Rule 12 – as well as the promises of strict confidentiality made to Mr. Kramer by Committee staff and Members – I immediately wrote to bring this breach to the Committee's attention. I fully expected that I would receive a response echoing my own outrage and pledging to get to the bottom of this serious violation of House and Committee rules ostensibly by someone working for the Committee.

Instead, on December 27 at 2:49 p.m., I received a subpoena from the Committee for Mr. Kramer's deposition, signed by Chairman Nunes. And *just 10 minutes after that* – at 2:59 p.m. – Byron York of the Washington Examiner posted a story reporting on the subpoena and purporting to provide yet additional details from Mr. Kramer's testimony, gleaned from a Committee source. See Bryon York, *McCain Associate Subpoenaed in Trump Dossier Probe* (Dec. 27, 2017, 2:59 p.m.), The Washington Examiner, <http://www.washingtonexaminer.com/byron-york-mccain-associate-subpoenaed-in-trump-dossier-probe/article/2644460>. The leaks have since been further disseminated by additional media outlets. See, e.g., *Investigators Want Info on Sources Behind Anti-Trump Dossier*, Fox News (Dec. 28, 2017, 4:49 p.m.), <http://video.foxnews.com/v/5695186672001/?#sp=show-clips>; Kristina Wong, *House Intel Committee Subpoenas McCain Associate David Kramer for Trump Dossier Answers*, Breitbart News Network (Dec. 27, 2017), <http://www.breitbart.com/big-government/2017/12/27/house-intel-committee-subpoenas-mccain-associate-david-kramer-for-trump-dossier-answers/>; Chuck Ross, *House Panel Subpoenas McCain Associate for Names of Steele's Dossier Sources*, The Daily Caller (Dec. 27, 2017, 3:49 p.m.), <http://dailycaller.com/2017/12/27/house-panel-subpoenas-mccain-associate-for-names-of-steeles-dossier-sources/>.

This pattern of leaking is inexcusable and in clear violation of the Committee's own rules and the express assurances made to my client. What is more, the latest leaks went to *the press*, thereby amplifying by orders of magnitude the potential risk of harm faced by my client (and others) – risks whose validity and seriousness several Members purported to acknowledge at the December 19 session.

I call upon you both to identify the source(s) of these leaks and to take swift and appropriate measures now to discipline the wrongdoer(s). It should not be difficult to ferret out the leaker(s). The fact that Mr. York was able to post a detailed account of Mr. Kramer's purported testimony almost immediately after the subpoena was issued strongly suggests that Mr. York's source leaked the information to him a sufficient amount of time *before* the subpoena was issued, and simply asked Mr. York to embargo the information until the issuance. You might therefore wish to begin your inquiry with the subset of Committee Members and staff who were aware of Chairman Nunes's issuance of the subpoena enough time before 2:49 p.m. to enable Mr. York to post a detailed news article only ten minutes later.

Finally, and in all events, I would ask that, in light of this pattern of repeated and highly prejudicial leaking, the Committee revisit its decision to insist on further testimony from Mr. Kramer. As you know, Mr. Kramer has already testified before this Committee, at great length and at considerable personal risk. Given all of the present circumstances, including those reflected in this letter and the personal risks to Mr. Kramer and third parties (as disclosed to the Committee

Representative Devin Nunes, Chairman
Representative Adam Schiff, Ranking Member
January 5, 2018
Page 3

in Mr. Kramer's testimony), the appropriate course of action is to withdraw the subpoena for further testimony.

Very truly yours,

Lawrence S. Robbins /LSR

Lawrence S. Robbins

cc: Hon. K. Michael Conaway
Nick Ciarlante
Kashyap Patel
Scott Glabe
Mark Stewart
Wells Bennett
Maher Bitar
Shannon Green